# Petition

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IN THE

# Supreme Court of the United States

**October Term, 1981**

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THE PEOPLE OF THE STATE OF NEW YORK,
*Petitioner,*

*vs.*

WAYNE CLAUDE UTTER,
*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE STATE OF NEW YORK COURT OF APPEALS

## PETITION FOR A WRIT OF CERTIORARI

COLIN E. INGHAM
*Otsego County District Attorney*
*Attorney for Petitioner*
172 Main Street
Oneonta, NY 13820
(607) 432-5376

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981.

THE PEOPLE OF THE STATE OF NEW YORK,

*Petitioner,*

*vs.*

WAYNE CLAUDE UTTER,

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## PETITION FOR A WRIT OF CERTIORARI.

TO: THE HONORABLE, CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The People of the State of New York, the Petitioner herein, pray that a writ of certiorari issue to review the remittitur as specifically set forth at page D-1 of the Appendix hereto, which is the order of the State of New York Court of Appeals entered in the above-entitled case of The People of the State of New York vs. Wayne Claude Utter in the office of the Clerk of the County of Otsego on the 30th day of June, 1981. Said order of remittitur entered by the State of New York Court of Appeals affirmed the reversal of a conviction of Murder in the Second Degree of Wayne Claude Utter, entered in the Otsego County Court on the 21st day of May, 1979.

## Question Presented.

May a state constitutionally prohibit a person, in the custody of law enforcement officials, from waiving his right to an attorney under Amendment 6 of the United States Constitution and Article 1, Section 6, of the New York State Constitution after commencement of a criminal proceeding?

## Parties.

The People of the State of New York and Wayne Claude Utter are the only parties herein.

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## Opinions Below.

The opinion of the State of New York Court of Appeals decided June 16, 1981, in 53 N. Y. 2d 213 (1981) is attached hereto in the Appendix at page A1. The opinion of the New York State Appellate Division of the Supreme Court, Third Judicial Department, decided June 26, 1980, in 76 A. D. 2d 1013 (1980) is in the Appendix herein at page B1. The decision of Otsego County Court Judge, Joseph A. Mogavero, Jr., dated April 19, 1979, is in the Appendix herein at page C1.

The order of the State of New York Court of Appeals, which is called a remittitur, was entered in the office of the Clerk of the County of Otsego on June 30, 1981, and is attached hereto in the Appendix at page D1. The jurisdiction of the Supreme Court is invoked under Title 28 U.S.C.A. Section 1257 (3) on the grounds that the State of New York Cour of Appeals decision in *People vs. Wayne Claude Utte.*, based on the decision of the State of New York Court of Appeals in *People vs. Samuels*, 49 N. Y. 2d 218 (1980), violates the Sixth and Fourteenth Amendments of the United States Constitution in that it applies an inflexible rule which prohibits a person from waiving his constitutional right to counsel after commencement of a criminal proceeding, thereby requiring a person to unconstitutionally seek the assistance of counsel.

## Statement of Material Facts.

At approximately 8:50 a.m. on the morning of February 11, 1979, the Otego Emergency Squad was called to the home of Denese Northrup in response to her call saying that she believed her young son, Chad Springett, two and a half years of age, had stopped breathing. Members of the Emergency Squad responded to the call and found Chad Springett lifeless, and their subsequent resuscitation efforts failed.

H. K. Chandler, a Senior Investigator with the Bureau of Criminal Investigation of the New York State Police, took charge of the investigation of the case. In the course of the investigation Denese Northrup was questioned, both at her home and at the State Police Substation in Oneonta, New York. A statement of Denese Northrup, together with other information, formed the basis for a felony complaint which was thereafter filed in the Town Court, Town of Otego, County of Otsego and State of New York. On the basis of the felony complaint a warrant of arrest was issued for Wayne Claude Utter in the early afternoon of February 11, 1979. Wayne Claude Utter was arrested on the same date at approximately 10:00 p.m. by the Oneonta City Police Department and they immediately transported him to the New York State Police Substation at Oneonta, New York.

While at the State Police Substation, the defendant was properly advised of his *Miranda* warnings, waived the same and thereafter was interviewed by Investigators Chandler and Brown of the Bureau of Criminal Investigation. At the conclusion of the interview, defendant knowingly, voluntarily and intelligently executed a statement of an inculpatory nature, a copy of which statement is attached hereto at page E1 of the Appendix. With respect to the statement, admission and confessions of the defendant, a hearing was held on March 30, 1979, before the Hon. Joseph A. Mogavero, Jr., Otsego County Court Judge, pursuant to *People vs. Huntley,* 15 N. Y. 2d 72 (1965), which motion was denied. The statements of the defendant were properly admitted at the trial of this case, as a result of which trial, on May 9, 1979, an Otsego County Court jury returned a verdict of guilty of Murder in the Second Degree against Wayne Claude Utter.

During the Suppression Hearing the defendant was asked and replied at R-37A:

> Question: After you were picked up were you advised of your rights?
>
> Answer: Yes, sir. They told me my rights when they took me over to the police station.

At the trial the defendant took the stand in his own defense and on cross examination was asked and replied at page 239:

> Question: Officer Bingham testified on this trial, you heard him testify, he testified you were given your rights.
>
> Answer: Yes sir.
>
> Question: Is it your testimony he did give you your rights?
>
> Answer: Yes sir.
>
> Question: Did you understand those rights?
>
> Answer: Yes sir.

and at page 241,

> The Court: Likewise I take it you don't dispute the fact either Chandler or Brown likewise advised you of your rights and you again waived them?
>
> Answer: They advised me of my rights when they took the statement.

> Question: You knew your rights didn't you? You knew you had the right to talk to a lawyer if you wanted to didn't you?
>
> Answer: Yes sir.
>
> Question: You didn't have to say anything. You understood that didn't you?
>
> Answer: Yes sir.

In the decision of the Otsego County Court dated April 19, 1979, denying the motion to suppress the defendant's statements, admissions or confession, the Court specifically found that the defendant had been advised of his rights and that he understood them; that the defendant stated he didn't want an attorney and that he would answer their questions; that no force, promises, threats or other inducements were used to secure any statement, admission or confession and that defendant was in control of his faculties.

The defendant's conviction was reversed by the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, on June 26, 1980, under the constraint of *People vs. Samuels,* 49 N. Y. 2d 218 (1980), in spite of the fact that the rule enunciated in *Samuels* was pronounced one year after the events in question.

The Federal question herein was raised in the brief submitted to the State of New York Court of Appeals upon review of the reversal of conviction ordered by the Appellate Division, Third Judicial Department. The question was raised more specifically at Point 1 which states: "To determine whether a Defendant's statement, admission or confession is admissible against him at trial, the totality of the circumstances under which he made the statement, admission or confession must be examined to determine whether he knowingly, intelligently and voluntarily waived his right to counsel, the application of any inflexible, per se, rule in such circumstances being unconstitutional."

The State of New York Court of Appeals did not expressly pass upon this constitutional issue. Though, of course, it could not have affirmed the decision of the Appellate Division, Third Judicial Department, without resolving the constitutional question against the petitioner.

## POINT 1.

**A state cannot constitutionally require an individual to obtain counsel at any stage of a criminal proceeding.**

In *People vs. Bodie,* 16 N. Y. 2d 275 (1965), the Court of Appeals of the State of New York was squarely presented with the question of whether one who is in police custody and against whom an information has been filed and an arrest warrant issued may waive his right to counsel with the result that inculpatory statements thereafter made are admissible. Although this case was decided prior to the decision of this Court in *Miranda vs. Arizona,* 384 U. S. 436 (1966), the Court, in determining that such statement was admissible, recognized that the right to counsel under the Sixth Amendment of the United States Constitution, and presumably under the New York State Constitution, imported the right to refuse counsel. Specifically, the Court held that, even if the police advised the defendant of his constitutional rights under *Miranda,* the right to counsel may be waived.

In *People vs. Samuels, supra,* the New York State Court of Appeals held that after an accusatory instrument was filed the defendant may not waive his right to counsel in the absence of counsel. This rule has been held to apply retroactively to any case then in the appellate process. The *Samuels* decision stands for the proposition that, once the right to counsel attaches during a criminal proceeding, a defendant cannot himself waive his personal right to counsel.

There can be no doubt that the right to counsel is a personal right guaranteed by the Constitution of the State of New York and the Constitution of the United States. We have always recognized that a person can make a choice as

to whether or not he would exercise those rights. The law has consistently held that the defendant can waive his right to an attorney as long as that waiver is knowingly, intelligently and voluntarily made. Once the prosecution asserts that the defendant waived his right to counsel, it has always been the burden on the Court to determine, after a full evidentiary hearing, whether such a waiver was knowingly, intelligently and voluntarily made. In spite of the fact that the filing of a felony complaint marks the commencement of adversary judicial proceedings in a criminal context, the question of whether a defendant can thereafter waive his right to counsel should depend on the totality of the circumstances and a determination as to whether the alleged waiver was knowingly, intelligently and voluntarily made. New York Criminal Procedure Law Section 60.45.

The decision in *Samuels* represents no more than an attempt to force upon each criminal defendant an attorney, an issue recently addressed by this Court. *Faretta vs. California,* 422 U. S. 806 (1975). In *Faretta* the United States Supreme Court determined that a criminal defendant has a constitutional right to represent himself under the Sixth Amendment. As stated in *Faretta,*

> "The Sixth Amendment does not merely provide that a defense shall be made for the accused; it grants to the accused, not counsel, who must be informed of the nature and cause of the accusation, who must be confronted with the witnesses against him and who must be accorded compulsory process for obtaining witnesses in his favor. Although not stated in the amendment in so many words, the right to self-representation, to make one's own defense personally, is thus necessarily implied by the structure of the amendment. The right to defend is given directly to the accused for it is he who suffers the consequences if the defense fails."

The Court further stated

> "The language and spirit of the Sixth Amendment contemplates that counsel, like the other defense tools guaranteed by the Amendment shall be an aid to a willing Defendant, not an organ of the State interposed between an unwilling Defendant and his right to defend himself personally. To thrust counsel upon the accused against his considered wish thus violates the logic of the Amendment. In such a case counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists."

This Court proceeded to emphasize at page 834 that:

> "It is the Defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect which is the life blood of the law."

As recently stated by the Second Circuit Court of Appeals in *U. S. vs. Mohabir,* 624 F. 2d 1140 (1980), any thoughts of outlawing all statements following uncounseled waivers "might run counter to the policies that a defendant constitutionally can insist upon proceeding without counsel even though he has been fully advised of the folly of doing so."

It is respectfully submitted that the decision in *People vs. Utter* and *People vs. Samuels* directly contravenes the Sixth Amendment as construed in *Faretta* because it compels the defendant arrested by a warrant to have an attorney present before he makes any statement to the

police. Although a state can extend the guarantees of the Constitution, a state cannot, either by decisional law or legislation, prohibit an individual from freely exercising his constitutional rights or from freely refusing to exercise his constitutional rights (see U. S. Const. 14th Amend.).

If the New York State Police had required this defendant to obtain the services of an attorney before making any statement to them, the State Police would, in effect, have violated the defendant's federal constitutional right to proceed without counsel.

In *North Carolina vs. Butler,* 441 U. S. 369 (1979), this Court was called upon to determine whether a defendant's confession made during custodial interrogation without counsel after giving of *Miranda* warnings was admissible in spite of the absence of an explicit waiver of the right to counsel. After recognizing that if an interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests upon the People to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel, the Court upheld the defendant's conviction. The State of North Carolina has a rule which requires that, before a defendant's statement, admission or confession is admissible against him, he must make a specific, oral or written waiver of his right to counsel as guaranteed under the State Constitution.

This Court recognized that *"even when a right so fundamental as that to counsel or trial is involved, the question of waiver must be determined on the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused." Johnson vs. Zerbst,* 304 U. S. 458 (1938). (Emphasis added.)

The Sixth Amendment guarantees the accused "that he need not stand alone against the state at any stage of the prosecution, formal or informal, in court or out, where counsel is absent might degregate from the accused's right to a fair trial." *United States vs. Wade,* 388 U. S. 218 (1967). Thus it is clear that the principles enunciated in *Faretta* apply equally to the trial stage of the criminal proceeding and to the commencement of the criminal proceeding. This Court should decide whether a defendant can constitutionally be required to seek the assistance of counsel before waiving his Sixth Amendment guarantees. This Court explicitly did not decide whether an individual could not, without notice to counsel, waive his rights under the Sixth and Fourteenth Amendments in *Brewer vs. Williams,* 430 U. S. 405-406 (1977). A state should not be allowed, by decision or legislative rule, to pronounce, in effect, that no person possesses sufficient intellect to make such a decision without counsel. Furthermore, it is submitted that a state cannot constitutionally prohibit a person from choosing not to exercise his constitutional rights.

## POINT 2.

**A state cannot impose an inflexible, per se, rule with respect to the waiver of constitutional rights.**

As previously expressed, the decision in *Samuels* is merely an attempt to defeat an individual's constitutional right of self-representation and, as such, *Samuels* violates the Sixth and Fourteenth Amendments of the United States Constitution and is itself unconstitutional. *Samuels* imposes a per se inflexible rule that upon the filing of a criminal complaint and the issuance of an arrest warrant, a defendant who is thereafter taken in custody cannot, without the assistance of counsel, waive his right to counsel.

This Court has addressed this particular issue on many occasions. In *North Carolina vs. Butler, supra,* this Court recognized that the issue of waiver is still whether the defendant, in fact, knowingly and voluntarily waived the right granted him as delineated in the *Miranda* case. In overruling the decision of the North Carolina Supreme Court, this Court recognized that there was no reason to discard the normal standard imposed in determining whether the defendant knowingly, intelligently and voluntarily waived his constitutional rights. The Court stated, "By creating an inflexible rule that no implicit waiver can ever suffice, the North Carolina Supreme Court has gone beyond the requirements of federal organic law. It follows that its judgment cannot stand since a state court can neither add to nor subtract from the mandates of the United States Constitution." *Oregon vs. Hass,* 420 U. S. 714 (1975).

In *Fare vs. Michael C,* 442 U. S. 707 (1979), the Supreme Court was called upon to decide whether a sixteen-and-one-half-year-old boy in custody invoked his right to counsel by requesting the opportunity to see his probation officer after administration of the *Miranda* warnings. The California Supreme Court had held that the request to see the probation officer was a per se exercise of his *Miranda* rights and, therefore, suppressed his statement. *In re Michael C,* 21 Cal. 3rd 471 (1978). This ruling was largely based on the California law requiring that the probation officer represent the interests of the juvenile.

In reversing the California decision, this Court once again indicated that the admissibility of the statement, i. e., the waiver of counsel, is a question to be resolved by examining the totality of the circumstances surrounding the interrogation. Recognizing that "a state may not impose * * * greater restrictions as a matter of federal constitutional law when this Court refrains from imposing

them," the Court stated: "This totality of the circumstances approached is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. We discern no persuasive reasons why any other approach is required * * *."

The decision of the Court of Appeals of the State of New York in the instant matter and in *Samuels* is in direct contravention of the mandates of this Court as a complete and utter disregard of the totality of the circumstances approached to determine whether a knowing, intelligent and voluntary waiver of counsel has occurred. Arguably, the government could be put to a heavier burden of showing a proper waiver as indicated by decisions in several federal courts. It is respectfully submitted that in the case at hand the standard of "heavier burden" has been met. Consider the fact that this defendant had thirteen prior criminal convictions. Surely it cannot be concluded that this defendant lacked the experience in dealing with the criminal justice system to be unable to formulate his own decision as to whether he needed the assistance of counsel prior to the interview.

If the decision in *Samuels* is constitutional, the results will be intolerable in any society which claims organization based on the laws of the people. No member of this Court, after a review of the record, can honestly contend that Wayne Claude Utter is not responsible for the death of Chad Springett. The Otsego County Court, prior to the *Samuels* decision, properly applied the totality of the circumstances test in determining that the defendant's statement was admissible. The application of any other rule, especially an inflexible rule such as *Samuels*, is condemned by the supreme law of the land and should be so condemned in the State of New York. As Benjamin Cardozo wrote in 1934, "Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be

strained until it is narrowed to a filament. We are to keep the balance true."

The imposition of any inflexible per se rule in this situation raises the attorney to the level of master and subjects the client to the role of servant. This theory has been condemned on numerous occasions by this Court as in and of itself violative of the Sixth Amendment guarantees.

**Conclusion.**

This Court should grant certiorari and the judgment below should be reversed.

Dated: August 28, 1981.

Respectfully submitted,

COLIN E. INGHAM,
Otsego County District Attorney,
Attorney for Petitioner,
172 Main Street,
Oneonta, N. Y. 13820
(607) 432-5376.

# APPENDIX A.

## Opinion of New York State Court of Appeals.

COURT OF APPEALS,

STATE OF NEW YORK.

No. 325

THE PEOPLE &c.,

*Appellant,*

*v.*

WAYNE CLAUDE UTTER,

*Respondent.*

(325) Colin E. Ingham, DA, Otsego County, for appellant.
James L. Dowsey, III, Pt. Washington, for respondent.

FUCHSBERG, J.:

Crucial to these three appeals, each emanating from a conviction of a felony unrelated to the others, is a common question. It calls upon us to determine what retrospective effect, if any, is to be accorded our decision in *People v. Samuels* (49 NY2d 218), where in essence we held that once an accusatory instrument has been filed a

defendant cannot waive his constitutional right to counsel save in the presence of counsel.

The *Samuels* rationale rested on a fundamental and uncomplicated principle, that once an accusatory instrument is filed, viewed realistically, the defendant is no longer a suspect but an accused, and the People's role may then be said to have shifted from the more neutral theater of investigation to the far more aggressive one of prosecution. In this posture, unless our adversary system of criminal justice is to flounder on the happenstance of whether, for example, a particular defendant is ignorant or sophisticated, "any discussions relating thereto should be conducted by counsel for at that point the parties are in no position to safeguard their rights" (*People v. Settles,* 46 NY2d 154, 163-164 [criminal proceeding initiated by indictment]).

The relevancy of the retroactivity of this holding to the cases at hand appear in the following contexts:

In *People v. Pepper* and *People v. Utter,* statements were elicited from the defendants after felony complaints had been filed and arrest warrants had issued. In *Pepper,* the executing officers took the defendant to the police barracks; in *Utter,* it was to a police substation. At each location it is established that, though the custodial warnings commanded by *Miranda v. Arizona,* 384 US 436, were given, the defendant voluntarily submitted to the uncounselled interrogation. In both cases, the implicated questioning occurred well before we decided *Samuels.* When the defendant in each case moved, *inter alia,* to suppress his statement, the respective County Courts heard and denied the motions. However, on each defendant's appeal from his ultimate judgment of conviction, the Appellate Division, now acting post-*Samuels,* reversed the judgment, granted the motion to suppress and remanded the case to the County Court for further proceedings. The People now appeal from the orders of reversal, each by leave of a Judge of this Court (CPL 460.20).

In *People v. Torres*, two statements, on an oral confession made to a police detective and the other a stenographically recorded statement made to an assistant district attorney, were obtained from the defendant under circumstances sufficiently similar for the People to concede that *Samuels* is factually opposite. But, for present purposes, this case is distinguished from *Pepper* and *Utter* in the important respect that, after the trial court, here the Supreme Court sitting in Kings County, had denied suppression, the Appellate Division, before whom the appeal arrived before rather than after we ruled in *Samuels*, affirmed. To be precise, though sentence had been pronounced on Torres on March 3, 1976 and the Appellate Division affirmed his conviction on June 26, 1978, it was not until more than a year and a half later, June 15, 1980, that we decided *Samuels*. Long before then, on August 15, 1978, a Judge of this Court had denied Torres' application for leave to appeal (45 NY2d 831). The ultimate grant that presently brings up the defendant's appeal was on an application for reconsideration presented post-*Samuels* (50 NY2d 1064).[1]

The position of each party on the pivotal prospective versus retrospective issue is pointed. In all three cases, emphasizing, among a miscellany of considerations, that "*Samuels* established wholly new law in New York", that it does not relate to the integrity of the fact-finding process, that law enforcement authorities have placed justifiable reliance on the "pre-*Samuels*" rule and that the impact of restrospective application on the administration of justice would be both adverse and "monumental", the People ask that it be applied prospectively only to those cases tried after *Samuels*. However, against the contingency that we find we announced that decision, they urge,

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[1] As required by *People v. Welcome* (37 NY2d 811), the application for reconsideration was made to the Judge who initially denied leave to appeal. (See, also, 22 NYCRR Section 500.8, subd. b.)

in the alternative, that in Torres' case we treat the date when his initial application for leave to appeal to this Court was denied as the end of his appellate road. As to the defendants, not surprisingly, Torres insists that his case is still not finally determined, and all three seek full retroactivity. For the reasons which follow, we believe the Appellate Division's decision was correct in two of the cases and we do not reach the third because it was no longer in the appellate process.

None of the arguments submitted to aid us in fixing the most appropriate date for putting the overruling in question into effect is new. All have figured in the extensive attention the subject has received from jurists and commentators who in the last half century have searched for ways in which principled mitigation of the hardships that at times may accompany abrupt changes in decisional law can be achieved (see Overruling Decision—Application, Ann., 10 A.L.R.3d 1371; Fairchild, Limiting New Judge-Made Law to Prospective Effect Only, 51 Marq L Rev 254; Cardozo, Address Before the New York State Bar Association, 1932 N.Y.S.B.A. Report 263, 296-298).

As a result, over the years, in some instances the historic common law rule, that all cases on direct appeal must be decided in accordance with any newly-declared but conceptually always-existent principle, has been tempered where there was significant reliance on a now overruled and, therefore, in theory, erroneously-stated precedent (see *People v. Morales,* 37 NY2d 262, 267-268 and authorities cited thereat: Snyder, Retroactive Operation of Overruling Decisions, 35 Ill L Rev 1212; Schaefer, The Control of "sunbursts": Techniques of Prospective Overruling, 42 NYU L Rev 631). However, notwithstanding such departures and the underlying tensions they display, overall much of the vitality of the traditional rule has survived the debate. This steadfastness is consonant with the fact that in any event most decisional law acts on past events. The retroactivity principle is also symbolic of the

credo that our government is one of laws and not of men, a concept which depends heavily on a sense of continuity. (See *Montague v. Vinzent*, ____F2d____[9th Cir; dec April 23, 1981]; Mishkin, The High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv L Rev 56, 62-67.)

The conflict between these opposing forces has not left the area of criminal procedure untouched. In a series of opinions, both this Court and the United States Supreme Court have addressed the subject, both in cases pending on direct appeal and, if the appellate process has been exhausted, where relief is sought in collateral proceedings (see, e.g., *United States v. Peltier*, 422 US 531; *People v. Morales*, 37 NY2d 262, 268-69, *supra*, and cases cited thereat).

This is not to say that definitive standards have evolved. But neither is the field untracked. As we noted in *Morales* (37 NY2d 262, 269, *supra*), useful, if general, guidelines, are available. In judging whether it is more appropriate to adhere to rather than deviate from the common law convention, be it to grant full retroactive application (permitting a collateral attack on a conviction no longer in normal appellate channels) or to limit relief to prospective police conduct or trials, in *Desist v. United States* (394 US 244, 249), the Supreme Court stressed, and in *Morales* we had occasion to weigh, three factors: "(a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards". In this formulation, the extent of the reliance and the nature of the burden on the administration of justice are of substantial significance only when the answer to the retroactivity question is not to be found in the purpose of the new rule itself (*Desist v. United States, supra*, p. 249).

Thus, where otherwise there would be a complete miscarriage of justice, current constitutional standards that

go to the heart of a reliable determination of guilt or innocence have been substituted for those in effect at the time of trial (see *Stovall vs. Denno,* 388 US 293, 297 [right to counsel decisions "at stages of the prosecution where denial of the right must almost invariably deny a fair trial"]; *Holloway vs. McElroy,* 632 F2d 605 [appellate review of sufficiency of evidence]). So too, at the other end of the spectrum, decisions which are only collateral to or relatively far removed from the fact-finding process at trial have been applied prospectively (e.g., *United States v. Peltier,* 422 US 531, *supra* [exclusionary rule in search and seizure cases, the intended deterrent effect of the ruling having no necessary relationship to the reliability of the admitted proof]).

In contrast to the extremes described in these Federal cases, as our own decisions have made clear, a defendant's right to counsel in pre-trial encounters falls within a middle ground. So, while we have found retroactivity in order in such cases, its application has been limited to those still on direct review at the time the change in law occurred (e.g., *People v. Albro,*____NY2d____, slip op pp. 4-5; *People v. Bell,* 50 NY2d 870; *People v. Singer,* 44 NY2d 241, 251; *People v. Madeonio,* 42 NY2d 944). In counterpoint, we have denied retroactive application where that process has been exhausted (*People v. Wooden,* 46 NY2d 938; *People v. Robles,* 42 NY2d 1051; *People v. Rivera,* 16 NY2d 879).

We see no reason to depart from that course here. While we cannot say that uncounselled stationhouse interrogations necessarily go to the ultimate issue of guilt or innocence, they are not insignificant events. Aside from the avoidance of incriminating statements, the benefits of introduction of counsel at that state, with its concomitant advantages or early advice and investigation, are not to be ignored.

In addition, in balancing the importance of the right *Samuels* guarantees against its effect on other pending cases, we cannot lose sight of the fact that the relatively

early terminal point of retroactivity limited to cases young enough to still be on direct appeal militates against the likelihood of prejudicial mildewing of witnesses' memories.

The People's reliance argument is even less impressive. For one thing, our decision need not have taken the People by surprise. Given the broad philosophical language of *People v. Hobson* (39 NY2d 479, 484), which, in turn, had been more than foreshadowed by *People v. Arthur* (22 NY2d 325) and the still earlier cases cited therein, it was hardly unanticipatable. Indeed, since, as Justice Jackson put it realistically, "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances" (*Watts v. Indiana,* 338 US 49, 59), it is difficult to perceive how they could have ended up in a different position from the one in which suppression leaves them, i.e., without the statement.

Appellant Torres, however, is not entitled to benefit from the change in law. The normal appellate process came to an end for him upon the original unconditional denial of his application for leave to appeal to this Court (*People v. Muller,* 11 NY2d 154, 156, cert den 371 US 850).[2] Thereafter, only complete retroactivity could make *Samuels* applicable. And that, impermissibly, would mean that every defendant to whose case it was relevant, no matter how remote in time and merit, would become its beneficiary. Absent "manifest injustice", no exception was available to Torres (*People v. Robles,* 42 NY2d 1051, *supra*).

Accordingly, each of the orders appealed from is affirmed.

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[2]We note that, while a Judge of this Court has discretion to reconsider a prior denial of an application for leave to appeal, that discretion is exercised rarely (see *People v. Welcome,* 37 NY2d 811, *supra*). All the more is this so in light of the availability of a proceeding to vacate a judgment pursuant to Article 440 of the Criminal Procedure Law in circumstances in which a decisional law must be given complete retroactivity (see *People v. Pohl,* 23 NY2d 290).

GABRIELLI, J. (concurring):

I concur in the results reached by the majority in these appeals, but would base my conclusion on somewhat narrower grounds.

The question presented by these appeals is whether the rule enunciated in *People v. Samuels* (49 NY2d 218) should be applied retroactively to cases on appeal at the time the decision was announced. In *Samuels,* we held that the "indelible" right to counsel attaches upon the filing of a felony complaint. Once a felony complaint is filed, the criminal action is formally commenced and the accused cannot thereafter validly waive his constitutional rights in the absence of counsel.

Our holding in *Samuels* was based upon *People v. Hobson* (39 NY2d 479), which was routinely applied to cases that were in the appellate process at the time that decision was handed down (see, e.g., *People v. Macedonio,* 42 NY2d 944). Indeed, each time there has been a new development in the line of cases based upon *Hobson,* the new rule has been applied in a similar retroactive manner (see, e.g., *People v. Albro,*____NY2d____[decided May 5, 1981] and *People v. Bell,* 50 NY2d 870 [applying *People v. Rogers* (48 NY2d 167) retroactivel]; *People v. Lucas,*____ NY2d____[decided March 26, 1981] and *People v. Prince,* 50 NY2d 883 [applying *People v. Cunningham* (49 NY2d 203) retroactively]). There is simply no logical justification for treating the *Samuels* rule differently.*

In fact, the arguments in favor of according *Samuels* retroactive effect are particularly compelling, since the holding in that case was foreshadowed and even perhaps mandated by prior case law. In *People v. Settles* (46 NY2d

---

*Indeed, we have already applied the holding in *Samuels* to cases which arose before that decision was announced (*People v. Lucas,* ____NY2d____view, these cases alone are sufficient to dispose of the issues presented in the *Pepper* and *Utter* appeals.

154), we held that once an indictment is filed the "indelible right to counsel attaches and the accused can no longer effect a valid waiver of his rights unless his attorney is present (see *People v. Hobson, supra* [overruling *People v. Lopez* (28 NY2d 23, cert den 404 US 840)]; 51 St. John's L Rev 216, 220-222; see also *People v. Blake,* 35 NY2d 331). Although *Settles* involved an indicted defendant, the holding in that case was predicated upon the broader notion that a suspect is entitled to the full panopoly of protections inherent in the state constitutional right to counsel when "the character of the police function shifts from investigative to accusatory" (46 NY2d, at p. 163). *Settles* thus made it perfectly clear that the formal commencement of a criminal action is sufficient to trigger the *Hobson* right to counsel. From *Settles* it required but a simple mechanical application of logic to conclude that the right to counsel would also attach upon the filing of a felony complaint, which, like the filing of an indictment, represents the formal commencement of a criminal action (CPL 1.20, subds. 1, 8 and 17). Hence, far from representing an unexpected departure from precedent, *Samuels* was actually no more than a predictable elaboration of a well-settled and widely understood principal of law.

In light of the history of the *Samuels* rule, it is evident that the decisions of the Appellate Division in the *Pepper* and *Utter* cases should be affirmed. In each case, the Appellate Division, relying upon *Samuels,* reversed the conviction and ordered the inculpatory statement in question suppressed. Since the rights of both defendants were indisputably violated under our holding in *Samuels* and since *Samuels* is clearly applicable to cases such as these, which were in the appellate process at the time that decision was announced, there is no legal basis for upsetting the rulings made below.

A different analysis must be applied, however, in the case of defendant Torres, whose application for leave to appeal to this Court was denied some 22 months before *Samuels* was handed down. Unlike defendants Pepper and Utter, the defendant in the *Torres* case had already exhausted his appellate remedies by the time *Samuels* was decided (see *People v. Muller,* 11 NY2d 154, cert den 371 US 850) and, as our prior decisions indicate, he is therefore not entitled to have his conviction reopened on the basis of the *Samuels* rule (see *People v. Wooden,* 46 NY2d 938; *People v. Robles,* 42 NY2d 1051).

In each case: Order affirmed. Opinion by Fuchsberg, J. All concur, Gabrielli, J., in a separate opinion in which Cooke, Ch.J., and Jasen J., concur.

Decided June 16, 1981

**Appendix B—Opinion of the Appellate Division, Third Department.**

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

June 26, 1980 35997

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent,*

*v.*

WAYNE CLAUDE UTTER,

*Appellant.*

Appeal from a judgment of the County Court of Otsego County (Mogavero, Jr., J.), rendered May 21, 1979, upon a verdict convicting defendant of the crime of murder in the second degree.

In an indictment defendant was charged with the crime of murder in the second degree in violation of subdivision 2 of section 125.25 of the Penal Law based on allegations that he caused the death of a two and one-half-year-old baby by means of beating the baby with his hands and with a stick. Following a jury trial, defendant was convicted of said crime and sentence was imposed. This appeal ensued.

It appears from the record that an accusatory instrument was filed and as a result thereof a warrant of arrest

was issued directing the arrest of defendant. Defendant was thereafter arrested and given his *Miranda* warnings. He was then questioned in the absence of counsel and made a full confession. A pretrial motion was made by defendant to suppress the confession. The court denied the motion, concluding that defendant was given his *Miranda* warnings, that he understood his rights and that he voluntarily and knowingly waived his rights in making the oral and written admissions.

Defendant contends that the confession should have been suppressed due to the fact that it was obtained in the absence of counsel after an accusatory instrument was filed and that he could not waive his right to counsel in the absence of counsel. The Court of Appeals has recently addressed this precise issue and concluded that once a felony complaint is filed a defendant may not waive his right to counsel in the absence of counsel (*People v. Samuels*, 49 NY 2d 218). Consequently, defendant's confession was improperly admitted into evidence at trial and should have been suppressed. The trial court's failure to suppress defendant's confession may not, in the present case, be characterized a harmless error. The judgment, therefore, must be reversed and a new trial granted.

Having so concluded, we need not now consider defendant's remaining contentions.

Judgment reversed, on the law, and a new trial granted.

Sweeney, J. P., Main and Mikoll, JJ., concur; Herlihy, J., concurs in the result in a separate memorandum; Staley, Jr., J., dissents and votes to affirm in a memorandum

HERLIHY, J. (concurring in the result):

Here, the defendant in seeking a reversal of a judgment of conviction relies solely upon a court decision which summarily states a waiver is ineffective where counsel

must be present to waive the right to counsel and which decision was subsequent to the court's ruling in this proceeding.

The defendant does not contend that the statement was not voluntary, nor does he suggest police brutality, deception, or any other possible defense or his unusual susceptibility to a particular form of persuasion.

The defendant is not a paragon of virtue. He has 13 prior criminal convictions which should itself be a presumption that he knew his rights under the criminal law.

I would affirm, but must vote to reverse on constraint of *People v. Samuels* (49 N Y 2d 218).

STALEY, Jr., J. (dissenting):

Defendant was convicted of the crime of murder in the second degree for the brutal death of a two and one-half-year-old baby as a result of defendant's beating the child to death on February 11, 1979. As a result of a police investigation, a warrant for the arrest of defendant was issued on February 11, 1979, and defendant was taken into custody. Defendant was transported to a New York State Police Substation where he was advised of his rights. Defendant said he didn't require an attorney and would answer questions. Thereafter he gave a written statement of his involvement in the murder. After a *Huntley* hearing, the court denied defendant's motion to suppress his statement as evidence.

The record does not contain any evidence of the ground or statement upon which the warrant of arrest was issued. I am well aware of the holding of the Court of Appeals in *People v. Samuels* (49 N Y 2d 218, 221), wherein it is stated:

> By statute a criminal action now commences with the filing of an accusatory instrument (CPL 1.20, subd. 17), which includes a felony complaint (CPL 1.20, subds. 1, 8). Thus in this case the defendant's right to counsel attached when the felony complaint was filed and the arrest warrant issued * * *.

It was also held that a waiver of counsel could only be waived in the presence of defendant's attorney. Although the record herein does not contain any statement of a felony complaint, there is probably a presumption that such complaint did exist since a warrant of arrest was issued. In *People v. Cunningham* (49 N Y 2d 203), defendant requested to consult with an attorney and thereafter attempted to waive his right to counsel, which the court determined he could not do. In the *Samuels* case, defendant testified at the *Huntley* hearing that he had continually asked for an attorney and his mother testified that defendant telephoned her and asked her to contact a lawyer to represent him.

Defendant here has 13 prior criminal convictions and was, therefore, in a position to know his rights and assert them if he so desired. Under the circumstances, I am of the opinion that the ruling of the Court of Appeals in *People v. Bodie* (16 N Y 2d 275, 279) should control where the court stated:

> On the issue of waiver, this court may consider the defendant's previous experience with the law, e.g., his conviction for possession of a hypodermic needle (brought out at the *Huntley* hearing) as probative of what he understood the question "do you care for counsel" to mean. The fact that he said "No", coupled with the prior conviction, indicates that he understood the full import of the officer's

statement, and that he knowingly waived his right to counsel. It is important to note in this case that it does not involve an ignorant defendant who has not had any previous contact with the law.

(Cf. *People v. Hobson,* 39 N Y 2d 479, 491.)

Under the circumstances here, when such a heinous crime has been committed and knowingly acknowledged, the ruling of *People v. Samuels (supra)* lends itself to a less strict interpretation to the effect that justice should prevail and the conviction should be affirmed.

## Appendix C—Decision and Order of Mogavero, J.

STATE OF NEW YORK, COUNTY COURT,

COUNTY OF OTSEGO.

THE PEOPLE OF THE STATE OF NEW YORK

*against*

WAYNE CLAUDE UTTER

Indictment No. 9 (3-79)

Appearances:

George S. Kepner, Jr., District Attorney, Cooperstown, N.Y.

J. Barry Harper, Attorney for Defendant (Assigned), Richfield Springs, N.Y.

MOGAVERO, J.:

To clarify the record I want to show that the Court has examined the Grand Jury minutes and that there was sufficient legal evidence presented to it to substantiate the return of the indictment against this defendant if they chose to accept as facts certain evidence, which they apparently did. Motion to dismiss is denied.

A hearing was held on March 30, 1979 in connection with the motion to suppress certain alleged admissions and confessions. Two State Police investigators testified and the defendant testified. Decision was reserved.

## FINDINGS

A warrant had been issued for the arrest of this defendant and both the State Police and the Oneonta City Police were looking for him. The Oneonta City Police found him and took him into custody and transported him to the New York State Police at the Troop C Substation at Oneonta, New York. Defendant admitted that the City Police advised him of his rights. In any event Investigator Herbert Karl Chandler and Clayton E. Brown on February 11, 1979 interviewed the defendant. At that time the investigators identified themselves to the defendant and at that time when the investigators started to advise the defendant of his rights he, the defendant, stated that he had already been advised of his rights and that he understood them. In spite of that, Investigator Chandler advised him that he had the right to remain silent; that anything he said could be used against him in Court; that he had the right to have an attorney present at that time or any time in the future; that he had the right to have that attorney present before he answered any questions; if he didn't have the funds to hire his own attorney one would be provided for him without cost.

Defendant stated that he didn't want an attorney and that he would answer their questions. No force, promises, threats or other inducements were used to secure any statements, admissions or confessions. The defendant was in control of his faculties. He orally and in writing made certain admissions and confessions as set forth in the transcript of the hearing which is available to defendant's attorney and in exhibit 1 which was received for the purpose of the hearing, a copy of which has already been furnished to defendant's attorney.

These admissions, statements and confessions were made prior to the time the defendant was arraigned in the local criminal court on the charge that resulted in the issuance of the warrant and before the criminal proceeding had commenced.

I find beyond a reasonable doubt that the oral and written admissions of the defendant were made voluntarily and that he was not under the influence of fear produced by threats, coercion or force. Neither were any promises made to him. The constitutional rights of the defendant were not violated at any time from the time of his arrest to the termination of the questioning. I find beyond a reasonable doubt that the requirements of the United States Supreme Court as set forth in the case of *Miranda v. Arizona* were complied with. I find beyond a reasonable doubt that the warnings required under the *Miranda* decision were given in such a manner that the defendant was made unmistakably aware of his right not to speak and of his right to the assistance of counsel before speaking. I find beyond a reasonable doubt that the defendant understood his rights as a result of such warnings and that he voluntarily, intelligently and knowingly waived his rights in making the oral and written admissions.

The questions of credibility are resolved in favor of the police officers after a careful examination of the testimony and the manner in which they testified and their demeanor on the witness stand as compared to that of the defendant who testified.

## CONCLUSIONS

The motion to suppress is denied. Said oral and written statements will be admitted upon the trial of this matter for the consideration of the jury.

Dated: April 19, 1979.

JOSEPH A. MOGAVERO, JR.
Otsego County Judge

## APPENDIX D—Remittitur.

COURT OF APPEALS,

STATE OF NEW YORK.

The Hon. Lawrence H. Cooke, Chife Judge, Presiding

3 No. 325

THE PEOPLE &c.,

*Appellant,*

*v.*

WAYNE CLAUDE UTTER,

*Respondent.*

The appellant in the above entitled appeal appeared by Colin E. Ingham, District Attorney of Otsego County; the respondent appeared by James L. Dowsey, III, Esq.

The Court, after due deliberation, orders and adjudges that the order is affirmed. Opinion by Fuchsberg, J. All concur, Gabrielli, J., in a separate opinion in which Cooke, Ch.J., and Jasen, J., concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the County Court, Otsgeo County there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

JOSEPH W. BELLACOSA,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, June 16, 1981.

Otsego County, SS

Recorded on the 30th day of June, 1981 at 4:22 o'clock P.M., in Liber 34 of Sup. Ct. Orders, at page 108. June B. Hotaling, Clerk.

## APPENDIX E—Statement of Wayne Claude Utter.

STATE OF NEW YORK
TOWN OF DAVENPORT
COUNTY OF DELAWARE

February 11, 1979

The following represents a statement taken from Wayne Claude Utter, age 33, date of birth 4/16/45, of RD#1 Otego, New York. The statement is being taken at the State Police Installation in the Town of Davenport, Delaware County, New York. Present at the time this statement is being taken are: Wayne Claude Utter, Senior Investigator H. K. Chandler and Investigator C. D. Brown of the New York State Police. The statement will be in the form of a question and answer and the initials representing the questions and their answers will designate the following:

HKC—Senior Investigator H. K. Chandler
CDB—Investigator C. D. Brown
WCU—Wayne Claude Utter

This statement is being typed by Sr. Investigator Chandler and is commencing at this moment, the time being 11:27 PM on February 11, 1979.

HKC Wayne, as has been explained to you and as I will explain again, you have the right to remain silent, that you do not have to make any statement, that anything you do say can be used against you in a court of law, you have the right to have an attorney present before making any statement, and if you cannot afford to hire an attorney one would be appointed for you in your behalf without any cost to you, and you may have an attorney present right now or at any time in the future. Do you fully understand these rights?

WCU Yes.

HKC Are you willing to give me a statement at this time?

WCU Yes.

HKC What is your full true name, your date of birth and tell us where you live?

WCU Wayne Claude Utter, my birthday is April 16, 1945 and I live at RD#1 Otego, New York with Denese Northrup.

HKC Wayne, will you give us an account of the incidents which occurred yesterday, February 10, 1979 at your residence.

WCU I was home and got up at about 7:00 o'clock in the morning. I sat in the kitchen and drank coffee all morning.

HKC Who else was at the residence when you got up and through out the day?

WCU There was me and Denese and the two kids, Chad Raymond Springett and James John Northrup. Chad is two and one half years old and James is 4 months old.

HKC Continue on.

WCU At 10:40 o'clock in the morning, Denese walked over to the store and got some groceries. She returned at about a quarter of twelve. After she got back in the afternoon, I took a nap. I got up at about two o'clock. At about this time, I started drinking beer. I sat at the kitchen table and watched television. I also have a CB Radio and I listened to that. During this time I drank two six-packs of "Budweiser" beer. There came a time, I don't remember the time, but it was before dark that I sent Denese up to Mr. Hoyts, a neighbor to see if he would drive me to Oneonta, New York.

HKC Why did you want to go to Oneonta?

WCU I was going to see if I could get some money. I was going to try and borrow some money.

HKC Why did you need money?

WCU Groceries and things like that.

HKC Go on.

WCU While Denese was gone, Chad cut his foot. A boat motor fell on him. The motor was in his room and the motor was in his closet. He was playing with his toys and the motor fell over his foot. I took Chad into the bathroom, washed the cut. When I took his pagamas off, I washed his foot, I put some peroxide on it and then I put some methiolate on it. I then noticed that he went "potty" in his pants. At this time Denese came home. I got a stick which I normally use to spank Chad with, the stick was in the bathroom.

HKC Describe the stick.

WCU It is about 12 inches long, 3 inches wide and about a quarter inch thick.

HKC Go on.

WCU I spanked him with the stick on the left knee and leg. I back handed him, but I don't remember how many times. I can't remember how many times I hit him with the stick. Its possible that I may have hit other parts of his body, I just can't remember. I then told Chad to eat some of the shit in his underpants and he picked up his under pants and started eating his shit. White he was eating the shit, I hit him some more with the stick and I gave him some more back hands. I know that Chad flew back and struck his head a couple of times on something, but I don't know what he hit his head on. I could have hit Chad in the head with the stick at this time.

HKC During this time, what was Denese doing or saying?

WCU She told me to stop. Finally, she got in between me and Chad.

HKC Then what happened?

WCU At this time, Mr.Hoyt came and I left with him.

HKC Wayne, I observed a lot of bruises on Chad's body and a few of them appeared to be older. Can you explain any of these bruises?

WCU Some of them, I might have done as it was usual for me to spank Chad three or four times a week or whenever I was there. I sometimes wasn't there that much.

HKC Did you always use the same stick and did you usually use the back of your hand?

WCU Yes.

HKC Did you ever use your fist?

WCU Maybe just a partial fist. I also might have used a partial fist yesterday too.

CDB How often were you at Denese's house during the week?

WCU Sometimes I was there all week and sometimes I was only three or four days a week.

CDB Did Chad on some occassions make you mad with his behavior?

WCU Yes, sometimes he would really get me pissed off. More so when I was drinking than at any other time.

CDB On the times when you were drinking and were really made at Chad and were hitting him hard with the stick, what was Denese's reaction?

WCU She never said anything to me while I was doing it. She always told me afterwards that I shouldn't do it.

HKC Did Denese ever hit Chad with the stick or with anything else?

WCU Yes. She used to spank him with the stick and with her hand, but I never paid any attention to where she hit him. That used to be a lot of our hassel. I told her that he had to be made to mind and the only way to make him mind was

to spank him. She agreed that Chad should be spanked, but that I shouldn't hit so hard.

HKC After these spankings and particularly after the one yesterday, didn't you think that Chad should go to the doctor for treatment?

WCU I was just so mad at that time, my ride had come and I just didn't give a shit at that time.

HKC Did you ever check back with Denese to see how Chad was?

WCU No, there was no way.

HKC Wayne, it is now 12:17 AM on February 12, 1979. Is there anything else you would like to add to this statement?

WCU No.

HKC Do you know that it is a crime to swear to a false statement?

WCU Yes.

HKC I am going to ask you to read this statement consisting of 4 pages, and if it is the truth, I would like for you to swear to it and sign it. Do you understand?

WCU Yes.

WAYNE C. UTTER 12:32 AM

WITNESS:
H.K. Chandler
C. D. Brown

# Opposition

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NO. 81-442

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SUPREME COURT OF THE UNITED STATES

November Term, 1981

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THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

vs

WAYNE CLAUDE UTTER,

Respondent,

---

On Petition for Writ of Certiorari
to the State of New York Court of
Appeals

---

# BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

---

JAMES L. DOWSEY, III, ESQ
Attorney for Respondent
P.O. Box 321
Port Washington, New York 11050
(516) 883-8868

## QUESTION PRESENTED

May a state constitutionally prohibit a person, in the custody of law enforcement officials, from waiving his right to an attorney under Amendment 6 of the United States Constitution and Article 1, Section 6 of the New York State Constitution after commencement of a criminal proceeding?

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NO. 81-442

SUPREME COURT OF THE UNITED STATES

November Term, 1981

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

vs.

WAYNE CLAUDE UTTER,

Respondent,

On Petition for Writ of Certiorari to the State of New York Court of Appeals

# BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

## Preliminary Statement

Pursuant to a judgement of the Otsego County Court, State of New York, rendered May 9th, 1979, Wayne Claude Utter was convicted after a jury trial of murder in the second degree and was sentenced May 21st, 1979 to a term of imprisonment of twenty-five (25) years to life. The defendant appealed to the New York State Appellete Division of the Supreme Court, Third Judicial Department, which resulted in a decision of June 26th, 1980, reversing the defendant's conviction and ordering

a new trial. The People appealed to the State of New York Court of Appeals and by it's decision rendered June 16th, 1981, in 53 N.Y. 2d 213 (1981), unanimously affirmed the Appellate Division reversal.

Petitioner now seeks certiorari to review the order of the New York State Court of Appeals.

## Jurisdiction

The petition for certiorari was filed August 31, 1981. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C.A. 1257 (3).

## Opinion Below

The New York State Court of Appeals order unanimously affirming the order of the Appellate Division which is reported in 53 N.Y. 2d 213 (1981) is contained in Petitioner's Writ for Certiorari, Appendix D-1.

The Opinion of the Appellate Division of the Supreme Court Third Judicial Department is contained in Petitioner's Writ for Certiorari, Appendix B-1.

## Statement of the Case

On February 11, 1979, pursuant to a call the Otego Emergency Squad went to the home of Denese Northrup regarding her infant son, Chad Springett, who appeared lifeless. Law enforcement officials were called and it was apparent the child had died that morning.

H. K. Chandler, Senior Investigator of the New York State Police attached to Troop C, (appointed himself) conducted the investigation of the case. He questioned the mother, both at her home and at the State Police Station in Oneonta, New York. He also questioned the maternal grandmother whose attitude toward the Defendant was essentially negative. Statements of the mother and the maternal grandmother were the basis for the felony complaint he subsequently filed in the local criminal court. A warrant of arrest for Wayne Claude Utter was issued between 2:00 and 3:00 p.m. on February 11, 1979 and the Defendant was brought to the sub-station at approximately 10:30 p.m. of that same day.

State Police Investigators Chandler and Brown interviewed the Defendant. The Defendant had been arrested by law enforcement officers attached to the Oneonta Police Department and following his arrest was interviewed by the State Police

Investigators for approximately two (2) hours.

At the conclusion of the "interview," the Defendant signed a statement of an inculpatory nature. A hearing was held on March 30, 1979, before the Honorable Joseph A Mogavero, Otsego County Court Judge, pursuant to People v. Huntley upon the Defendant's motion that the written statement be supressed at trial. The motion was denied.

The Defendant subsequently was convicted of Murder in the Second degree on May 9th, 1979. Thereafter the Appellate Division, Third Department in its decision of June 26, 1980 reversed the Defendant's conviction of Murder in the Second Degree, ordering a new trial relying on People v. Samuels (49 N.Y. 2d 218), which clearly held that once a criminal proceeding has been commenced, as that term is defined in the Criminal Proceedure Law (CPL 1.20 subd. 17), the defendant may not be interrogated in the absence of counsel nor waiver of counsel had in the absence of counsel.

Thereafter the People appealed to the New York State Court of Appeals which unanimously affirmed on June 16th, 1981 the order of the New York State Appellate Division of Supreme Court, Third Judicial Department, in 53 N.Y. 2d 213 (1981).

## P O I N T I

### THE PETITION IS UNTIMELY

The Petition for Certiorari was filed August 31st, 1981. The decision of the New York State Court of Appeals was entered June 16th, 1981 in the Clerks Office of the Court of Appeals, Albany, New York and the record of said decision was remitted to the County Court, Otsego, New York on June 30th, 1981.

The Petitioner violates Rule 20.1 of the Rules of the Supreme Court of the United State by filing late and in excess of the sixty (60) day requirement thereof.

## POINT II

### THE QUESTION AS PRESENTED BY THE PETITIONER IS MISLEADING AND DECEPTIVE

The petitioner has neglected to articulate with accuracy the question which he wishes to be reviewed wherein on page five (5) of his brief he cites People vs. Brodie, 16 N.Y. 2d (1965), a pre-Miranda, decision which he evidently seeks to impose as a restriction of Miranda, wherein he authors, "Specifically, the Court (presumably re: People vs. Brodie) 1965, held that, even if the police advised the defendant of his constitutional rights under Miranda, (1966), "the right to counsel may be waived."

Petitioner's point I that "a state cannot constitutionally require an individual to obtain counsel at any stage of a criminal proceeding" is indeed, at best, misleading and wholly inappropriate. The rationale behind People vs Samuels, 49 NY 2nd 218 (1980), is to safeguard a defendants cherished right to counsel, whether a recidivist or a first offender. This cherished right is the accuseds real protection against an abusive power by the state and its investigative officers. It is more important than the preinterrogation warnings

given to the defendants in custody. These warnings offten provide only a feable opportunity to obtain a lawyer, because the suspect or accused is required to determine his need, unadvised by anyone who has his interest at heart.

The law in the State of New York is well settled as People vs Samuels (supra) has clearly established, that once a criminal proceeding has been commenced, as that term is defined in the Criminal Proceedure Law (CPL 1.20 Subd. 17) the defendant may not be interrogated in the absence of counsel nor a waiver of counsel had in the absence of counsel.

It is now firmly established that no waiver will be effective whereas here, the criminal process has commenced by the filing of a felony complaint and the right to counsel has attached at this critical stage. People vs. Settles (46 NY 2d 154).

It is respectfully submitted that the filing of an accusatory instrument as in the case at bar and as a result of arrest is issued directing the arrest of the defendant is the proceedural equivalent of the filing of an indictment by operation of Criminal Proceedure Law (CPL 1.20 (1) of the State of New York. In re: The People of the State of New York vs. Pannone, ( 398 NYS 2d 346' it was clearly held that

the defendant's statement, taken in the absence of counsel after the filing of an indictment, must be suppressed.

This same Court has observed and it has long been recognized that the police interrogation of a person who has been indicted is at such a critical stage of the proceedings against him that a failure to guarantee the aid of counsel during such interrogations might deny a defendant effective representation at the only stage when legal aid and advice would help him... Since the filing of an indictment presumably imports that the People have legally sufficient evidence against the defendant's guilt of the crime charged, it is manifest that post-indictment interrogation is a "form of pre-trial discovery" where the defendant is the all by irrevocable target.

It is manifestly clear that the petitioner has not indicated where in the proceedings in the State Courts the Federal question raised herein which is sought to be reviewed were raised and in what manner they were disposed, and therefore does not on this record, present a substantial question for review by this honorable Court.

## P O I N T III

A STATE AND SPECIFICALLY IT'S JUDICIARY HAS A CONSTITUTIONAL DUTY AS WELL AS AN INHERIT OBLIGATION TO PROTECT AND SAFEGUARD IT'S CITIZENRY FROM ANY AND ALL ATTEMPTS TO VIOLATE, INFRINGE, OR ABROGATE IT'S CITIZENS' CONSTITUTIONAL RIGHTS; PARTICULARLY AS TO WAIVER CONSIDERATIONS OF CONSTITUTIONAL RIGHTS.

This principal enumerated above is so basic to our fundamental concepts of justice as specifically promulgated by the infinate wisdom of our founding fathers as to warrant little comment except to note as every school child in this country is doubtlessly aware; the constitution itself is it's ultimate guarantee of freedom from tyranny.

The Sixth Ammendment specifically states:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defense."

The Petitioner's position at page nine (9) of his brief is in the opinion of this draftsman the ultimate in hypocracy. He states "The decision in Samuels is merely an attempt to defeat

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The Petitioner's position at page nine (9) of his brief is in the opinion of this draftsman the ultimate in hypocracy. He states "The decision in Samuels is merely an attempt to defeat

an individual's right of self-representation, and as such, Samuels violates the sixth and fourteenth Amendments of the United States Constitution and is itself unconstitutional." This is analogous to stating in essence; that no state shall pass any law nor shall it judiciarally assist by way of interpretation to insure that an accused in all criminal proceedings shall represent himself without the assistance of counsel for his defense.

The New York State Court of Appeals by it's excercising it's constitutional obligation and the oath of it's justices, to their credit and integrity by it's decision in Samuels have demonstrated as has this honorable Court, it's duty in safeguarding the rights of the individual against the cohersive powers of the State and it's investigative officers, and it is significant to note that during the appellate process within the State eleven (11) justices supported the defendant's rights and the single lone descenting justice, descented on the basis on page B-5:

> "Under the circumstances here, when such a heinous crime has been committed and knowingly acknowledged, the ruling of People vs. Samuels (supra) lends itself to a less strict interpretation to the effect that justice should prevail and the conviction should be affirmed."

It appears that the petitioner by exhibiting the defendant's statement at the conclusion of his brief is not addressing

himself to the merits of the question herein but to attempt to so inflame this honorable Court in the desperate hope it will perhaps subconsciously loose some of it's objectivity, looking to the nature of the alleged crime (as apparently may have occured by the lone descenting State justice) as balanced by the constitutional safe-guards that have been afforded every accused as so often this honorable Court has properly invoked.

## CONCLUSION

The question before this Court as enumerated by the Petitioner is not sufficient to warrant review.

THE PETITION FOR CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

JAMES L. DOWSEY, III, ESQ.
Attorney for Respondent
P.O. Box 321
Port Washington, New York 11050
(516) 883-8868

November, 1981

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SUPREME COURT OF THE UNITED STATES

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THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

NO. ~~80-5480~~ 81-442

vs.

WAYNE CLAUDE UTTER,
Respondent,

---

AFFIDAVIT OF JAMES L. DOWSEY,III

JAMES L. DOWSEY,III, ESQ. of )
Port Washington, New York ) ss:

I am the appointed attorney for the above mentioned Respondent and make this affidavit in support of a request to proceed in forma pauperis.

In the State Courts I was appointed first by the Appellate Division, Third Department of the Supreme Court to represent the above respondent on the grounds, he was and is indigent, the appeal resulted in a reversal of his conviction of the Trial Court. Thereafter, I was appointed to represent the said respondent in the New York Court of Appeals upon the appeal to said Court by the District Attorney of Otsego County, State of New York; on the continued grounds

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of the Respondent's indigency; and that he has been and still is, upon information and belief, incarcerated since February 11, 1979, and continues to be totally in a state of poverty to the best of your affiant's knowledge and belief.

That the clerk of this Honorable Court has directed a response be filed by your affiant in a letter dated the 10th day of November, 1981.

That your affiant, upon information and belief, understands that a pro se motion and affidavit by the Respondent, WAYNE CLAUDE UTTER, was submitted to the Clerk of this Honorable Court to proceed in forma pauperis and that this affidavit is made in support thereof in as much as your affiant believes, upon information and belief, that the Respondent has been and continues at this time, to be a citizen of the United States; unable to pay the costs of these instant proceedings, or to give security therefore; that he be granted leave to proceed in forma pauperis.

Sworn to and subscribed before
me this 27th day of November, 1981

11/27/81 Thomas C. Carpenter

THOMAS C. CARPENTER
NOTARY PUBLIC, State of New York
No. 30-4564585
Qualified in Nassau County
Commission Expires March 30, 1982

JAMES L. DOWSEY, III, ESQ.

SUPREME COURT OF THE UNITED STATES

---X

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

No. 80-5480

vs.

AFFIDAVIT OF SERVICE

WAYNE CLAUDE UTTER,
Respondent,

---X

SARAH JO WILSON of )
Port Washington, New York) ss:

That your affiant, is a citizen of the United States, over the age of twenty-one years, the secretary to the Resporent's attorney, JAMES L. DOWSEY, III, ESQ., and has this date served the within affidavit in support to proceed in forma pauperis together with the Respondent's response of the above captioned matter, upon the District Attorney, of Otsego County, of the State of New York; COLIN E. INGHAM, ESQ., at 172 Main Street Oneonta, New York, 13820, the address designated by said attorney for that purpose, by depositing a true copy of same, post paid properly addressed wrapper in the Post Office of Manhasset, New York. an official depository under the exclusive care and custody of the United States Postal Service.

Sworn to before me this
30th day of November, 1981

Sarah Jo Wilson
SARAH JO WILSON

11/30/81
Thomas C. Carpenter
THOMAS C. CARPENTER
NOTARY PUBLIC, State of New York
No. 30-4664685
Qualified in Nassau County
Commission Expires March 30, 1982